STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Hon. Kurtis T. Wilder, Hon. William B. Murphy, Hon. Peter D. O'Connell

GRASS LAKE IMPROVEMENT BOARD,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent-Appellee.
_____/

Supreme Court No. 154364

Court of Appeals No. 326571
30th Circuit Court No. 2014-1064-AA
Hon. William E. Collette

MAHS Case No. 09-63-0026-P

PETITIONER-APPELLANT GRASS LAKE IMPROVEMENT BOARD'S REPLY TO RESPONDENT-APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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INTRODUCTION

In its Application for Leave to Appeal, Petitioner-Appellant Grass Lake Improvement Board ("GLIB") asserted that: (1) that the Court of Appeals erred in reversing the Circuit Court's decision that it was frivolous for Michigan Department of Environmental Quality ("MDEQ") to assert, contrary to over 30 years of well-established case law, that the MDEQ was not required to follow its own duly promulgated rules; and (2) the Court of Appeals decision will be interpreted by future courts as allowing the MDEQ to ignore its rules where it claims there is "tension" between a rule and a statutory provision.

The MDEQ now claims that "if" it was forced to follow its own duly promulgated Rule, it would necessarily have to violate statute. This assertion is simply false. First, the MDEQ fails to demonstrate that there is any tension between the subject Rule and statute for the activities conducted by GLIB. That is because the Rule and statute can, and should, be read in harmony and given their plain meaning. The Rule simply provided the definition for "enlargement" of a lake and when such enlargement is a regulated activity conferring the MDEQ with regulatory jurisdiction. The pertinent statute makes no attempt to provide a definition of "enlargement" and was therefore subject to the MDEQ's rule making authority. GLIB's activities of augmenting the lake with ground water did not fall within any of the prohibited activities identified in the Rule and, as the MDEQ's director ultimately found, the MDEQ lacked regulatory jurisdiction over the activity. Had the statute and the Rule contained contrary definitions, then an actual conflict might exist. That is not the case here and there simply is no conflict between the Rule and statute.

Furthermore, the MDEQ now inexplicably claims that it is legally and factually impossible for this issue to arise again. This assertion is also false. This very issue – that the MDEQ will continue to ignore its duly promulgated rules where it claims there is "tension"

between its own rules and statutes – will undoubtedly arise again. The MDEQ has promulgated numerous rules covering a variety of statutory schemes and has done so pursuant to applicable enabling statutes. Further, the MDEQ maintains numerous guidance documents, operational memorandums, policy manuals and other documents. Because of the vast amount of interpretive rules and other documents maintained by the MDEQ, if the Court of Appeals decision is permitted to stand, the MDEQ will have the unfettered ability to assert that its own rules may be ignored. This would necessarily result in confusion and injustice for the public that will be required to guess whether MDEQ rules apply and, further, there will be no deterrent to the MDEQ asserting jurisdiction over matters where it lacks regulatory jurisdiction. There is a significant public interest in reversing the decision of the Court of Appeals.

I. THE MDEQ ASSERTS A FALSE PREMISE WHEN IT STATES THAT WOULD BE REQUIRED TO VIOLATE A STATUTE IN ORDER TO FOLLOW ITS OWN APPLICABLE RULE

The MDEQ maintains the statutory authority to promulgate rules to administer Michigan's Natural Resources and Environmental Protection Act ("NREPA") MCL 324.30101, *et seq*. As applicable to this case, the MDEQ promulgated Rule 281.811(1)(e) which provided the following definition:

> enlarge or diminish an inland lake or stream means the dredging or filling of bottomlands, or the dredging of adjacent shorelands, to increase or decrease a body of water's surface area or storage capacity or the placement of fill or structures, or the manipulation, operation, or removal of fill or structures, to increase or decrease water levels in a lake, stream, or impoundment.

Part 301 of NREPA does not provide a definition of the term "enlarge". It provides in relevant part: "Except as provided in this part, a person without a permit from the department shall not do any of the following. . . . [c]reate, enlarge, or diminish an inland lake or stream."

As fully described in GLIB's Application, there is no conflict between the Rule and statute and these provisions can be read together and provided their plain meaning and no

analysis of a conflict of law doctrine need be examined. The Rule provides the definition of the term "enlargement" as provided in the statute. There is no dispute between the parties that GLIB's activities did not fall within the definition provided in the Rule. The MDEQ does not point to a different definition in Part 301 or Rule itself. Instead, it relied upon and clung to a definition in a Guidance Document that is not a duly promulgated rule. As written, Part 301 and the Rule may be read in harmony and should have immediately been immediately interpreted to allow for this permit. The Michigan Court of Appeals wrongly decided this issue.

Even if there was some tension between Part 301 and the Rule, which there is not, the cases cited by the Court of Appeals either have no applicability to this case or actually support GLIB's position. The underlying Court of Appeals decision provided:

> [I]t has long been recognized by Michigan Courts that, due to the very nature of an administrative agency's rulemaking power, when a statute and an administrative rule conflict, the statute necessarily controls. *See, In Re Complaint of Rovas*, 482 Mich 90, 754 NW2d 259 (2008) at 98 ("While administrative agencies have what have been described as 'quasi-legislative' powers, such as rulemaking authority, these agencies cannot exercise legislative power by creating law or changing the laws enacted by the Legislature."); *Mich Sportservice v Nims*, 319 Mich 561, 566; 30 NW2d 281 (1948) ("The provisions of the rule must, of course, be construed in connection with the statute itself. In case of conflict, the latter governs. It is not within the power of the department of revenue to extend the scope of the act."); *Acorn Iron Works v Auditor Gen*, 295 Mich 143, 151; 294 NW 126 (1940) ("The state board of tax administration from time to time has changed its construction and method of enforcing the sales tax law as it affects building trade transactions; but in this connection it is sufficient to note that liability for payment of the sales tax is controlled by statute. It cannot be imposed by rulings or regulations of the board."); *Walgreen Co v Macomb Twp*, 280 Mich App 58, 71; 760 NW2d 594 (2008) ("A rule is invalid when it conflicts with the provisions of the governing statute.").

It is true that where a rule and statute conflict, a court must apply the statute. However, this is a judicial standard – not a standard by which agencies may make decisions on whether or not to apply their rules. It is simply wrong from the start that an agency can exercise judicial powers and apply its own rules in an arbitrary and capricious manner. *Micu v. City of Warren,*

147 Mich App 573, 584; 382 NW2d 823, 828 (1985), holds that an agency must follow its rules and, if it does not wish to follow its rules, the agency must change its rules. Such a holding is entirely consistent with the foregoing cases and does not in away way conflict with the idea that where a court is interpreting a truly conflicting rule and statute, the statute applies.

The fact remains that the MDEQ promulgated a Rule defining the enlargement of a lake. If it did not wish to follow that Rule, it simply needed to change the Rule. As pointed out by GLIB in its Application, the MDEQ acknowledge this fact in its filing in the *Nestle Waters* cases.[1] It cannot be the law that the public is made to guess whether an agency will or will not apply its rule to any particular manner. As such, the Circuit Court properly determined that the MDEQ's position was frivolous. Any other determination provides the MDEQ with the unfettered ability to regulate as it deems fits, with no consequences, leaving the public at the mercy of ever changing interpretation of rules.

In following its own Rule, the MDEQ would not be required to violate statute. By defining the term "enlarge" in its Rule, the MDEQ itself chose which activities it has jurisdiction to regulate. By not including the activities proposed to be conducted by GLIB, it follows that the MDEQ did not have jurisdiction to regulate those activities. Not regulating an undefined activity is a far cry from violating statute.

Accordingly, the Court of Appeals decision must be reversed.

[1] *Michigan Citizens for Water Conservation v. Nestle Waters N. Am., Inc.* See GLIB Application for Leave to Appeal, **Exhibit H** at 13-14; 17-18.

II. THE VERY ISSUE THAT THE MDEQ WILL BE ALLOWED TO IGNORE ITS DULY PROMULGATED RULES WILL ARISE AGAIN WHEN IT CLAIMS THAT THERE IS TENSION BETWEEN ITS OWN RULES AND THE STATUTORY PROVISIONS THAT IT ENFORCES

The MDEQ's assertion that it is legally and factually impossible for this issue to arise again is demonstrably false. In this case, the MDEQ admits that it eventually changed its Rule and further admits that under the previous Rule, it did not have regulatory jurisdiction. But amazingly, in the face of a vast regulatory rule making scheme, the MDEQ asserts that "it is legally and factually impossible for this issue to arise again." That assertion is simply false. In fact, as GLIB cited in its Application, the Court of Appeals has previously considered this question and ruled that the MDEQ must follow its rules. See e.g. *Micu v City of Warren*, 147 Mich App 573, 584; 382 NW2d 823, 828 (1985); *De Beaussaert v. Shelby Twp.*, 122 Mich App 128, 129, 333 NW2d 22 (1982). To claim that this case has no significant public interest is patently false. MDEQ's enforcement jurisdiction is routinely raised as an affirmative defense in enforcement actions. To allow the decision of the Court of Appeals to stand, any person that may have a legally valid jurisdictional defense would be unable to assert that defense.

The issue of whether the MDEQ, or for that matter other regulatory agencies, must follow their own jurisdictional rules has arisen before and will undoubtedly arise again. Accordingly, it is critical to the public interest to reverse the decision of the Court of Appeals and reinstate the decision of the Circuit Court.

CONCLUSION AND RELIEF REQUESTED

The MDEQ's legal position in the MAHS Case was frivolous because Michigan law does not give administrative agencies within the administrative process the authority to make determinations of the validity or invalidity of its rules, and then unilaterally and informally, take a course of action contrary to the rule, which is what the MDEQ did in this case. MDEQ's own

Director, Daniel Wyant, concluded that the MDEQ had "no basis" to simply ignore its own rule in the face of an "overriding tenant of administrative law" that an agency is bound by its administrative rules. Following its Rule simply would not require it to violate statute. The Circuit Court properly found that the MDEQ position had no arguable legal merit and that decision should be reinstated.

Furthermore, to now claim that there is a lack of significant public interest because it is legally and factually impossible for this issue to arise again is inherently false. There is a significant public interest in the MDEQ's vast regulatory power and in fact a necessity that agencies under all circumstances and at all times follow the rules and procedures which they have promulgated so that the public can rely on the process that is promised. This issue will arise again and, should the Court of Appeals decision be allowed to stand, the MDEQ will point to that decision as allowing it to administer its rules in arbitrary manner to regulate what it picks and chooses.

THEREFORE, Grass Lake Improvement Board respectfully requests that this Court grant the application for leave appeal, peremptorily reverse the decision of the Court of Appeals and remand the case to the Court of Appeals for entry of judgment reinstating the decision of the Ingham County Circuit Court.

Respectfully submitted,
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By: /s/ Douglas R. Kelly

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Dated: October 20, 2016

CERTIFICATE OF SERVICE

I state that on October 20, 2016, the foregoing Petitioner-Appellant Grass Lake Improvement Board's Reply to Respondent-Appellee's Response to Application for Leave to Appeal, was filed with the Court via the ECF system, and served upon all attorneys of record via electronic mail.

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